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Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

ERIC R. MEYER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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82 pp

QUESTION PRESENTED FOR REVIEW

1. Did the District Court's application of the United States Sentencing Guidelines, § 2D1.1(d)(1), cross-referencing for and finding defendant Eric Meyer guilty of murder, violate the Fifth and Sixth Amendments to the United States Constitution in light of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), where the indictment charged only a violation of 21 U.S.C. § 846, the jury made no finding as to Meyer's guilt beyond a reasonable doubt, and Meyer's sentence was enhanced to one of life imprisonment?

2. Does the imposition of a sentence above the twenty year statutory maximum for "unspecified drug quantities" set forth in 21 U.S.C. § 841(b)(1)(C), violate the Fifth and Sixth Amendments to the United States Constitution in light of *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), where the indictment did not allege the quantity of cocaine and marijuana, and where the jury was not instructed that the drug quantity was an "element" of the 21 U.S.C. §§ 841 & 846 offense and the jury made no findings as to the quantity?

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PETITION FOR WRIT OF CERTIORARI

Eric R. Meyer respectfully petitions the Supreme Court of the United States for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, rendered and entered in case number 99-1919 in that Court on December 4, 2000, which affirmed the judgment and commitment of the United States District Court for the Western District of Wisconsin.

OPINION BELOW

Copies of the two decisions of the United States Court of Appeals for the Seventh Circuit, affirming the judgment and

commitment of the United States District Court for The Western District of Wisconsin, are contained in Appendix A1-A31 & B1-B14.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule 10(c) of the Rules of the Supreme Court of the United States. The decision of the Court of Appeals from which review is sought was entered on December 4, 2000. This petition is timely filed in accordance with Sup.Ct.R. 13.1. The District Court exercised its jurisdiction pursuant to federal law because Mr. Meyer was charged with a violation of 21 U.S.C. § 846. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeal shall have jurisdiction for all final decisions of the United States District Courts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional and statutory provisions:

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...nor shall any person...be deprived of life, liberty, or property without due process of law...

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...and to be informed of the nature and cause of the accusation...

21 U.S.C. § 846

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. § 841

(a) Unlawful Acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -

> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance...

(b) Penalties

Except as otherwise provided in section 859, 860, or 961 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

> **(1)(A)** In the case of a violation of subsection (a) of this section involving –
>
> > (iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base...
> >
> > such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life...

(1)(B) In the case of a violation of subsection (a) of this section involving –

> (iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base...
>
> such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years...

(1)(C) In the Case of a controlled substance in schedule I or II...except as provided in subparagraphs (A),(B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years...

(1)(D) In the case of less than 50 kilograms of marihuana...such person shall...be sentenced to a term of imprisonment of not more than 5 years...

U.S.S.G. § 2D1.1(d)(1)

(d) Cross-references

> (1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1(first degree murder)

STATEMENT OF THE CASE

The Indictment

A Grand Jury sitting in the Western District of Wisconsin returned an indictment against Eric R. Meyer on April 24, 1996, charging him with conspiracy to possess with intent to distribute and to distribute Schedule I and Schedule II controlled substances, specifically marijuana and cocaine, in violation of Title 21, United States Code, Section 841(a)(1) and Title 21, United States Code, Section 846. (See App. C1-C2)

The Grand Jury did not include in its indictment any mention of the quantity of marijuana or cocaine involved in the conspiracy. Moreover, there was no charge or indictment for first degree murder in violation of Title 18, United States Code, Section 1111, and no other murder related charges were brought against Mr. Meyer.

Factual and Procedural Background

Many of the background facts relevant to this appeal are found in the Seventh Circuit's opinions in *United States v. Meyer*, 157 F.3d 1067 (7th Cir.1998), *cert. denied*, 526 U.S. 1070, 119 S. Ct. 1465 (1999) and *United States v. Meyer*, 234 F.3d 319 (7th Cir. 2000), which detail the no-love-lost relationship between Gordon Hoff Sr. ("Hoff") and his son, Gordon Hoff Jr. ("Rock"), and discuss their extensive drug dealing enterprises in northern Wisconsin. Petitioner-Defendant Eric Meyer was found to have been part of those enterprises.

Both Hoff and Meyer had entered into immunity agreements and provided information to the government regarding Rock's drug business. 157 F.3d at 1071-72. Hoff

also provided the government with information that Rock had been involved in the murders of three men, Dan Oestreich, Kirk Larson and Dennis Fenner. *Id.* at 1071.

After further investigation, the government claimed that Hoff and Meyer had breached their immunity agreements and charged both with conspiring to distribute cocaine and marijuana. *Id.* at 1072. Part of the basis for the claimed breach by Meyer was the government's insistence that he in fact had murdered Fenner in connection with the conspiracy. *Id.* at 1072. However, the government never sought to charge Meyer with murder and it was not included in the Grand Jury's indictment.

Trial was held before Judge Barbara B. Crabb from September 16-18, 1996, and key testimony was provided by Rock, who had entered into an immunity agreement with the government under which he pled guilty to a federal drug charge and received a 10-year sentence. *Id.* Rock also admitted killing Larson and was sentenced in state court to a 20-year term for second degree murder. *Id.* at 1072-73.

The jury found Hoff and Meyer guilty of conspiring to distribute a controlled substance in violation of 21 U.S.C § 846, and judgment was entered on December 20, 1996 (R. 181; 198).

On appeal, the Seventh Circuit reversed and remanded Meyer's case for a new trial because of an instructional error, *United States v. Meyer*, 157 F.3d 1067, (7th Cir. 1998), *cert. denied*, 526 U.S. 1070, 119 S. Ct. 1465 (1999), and the case was assigned to Judge John C. Shabaz and tried from February 8-10, 1999.

Once again, Meyer was found guilty of conspiring to distribute a controlled substance in violation of 21 U.S.C § 846 and judgment was entered on April 9, 1999. (R.318 at 105-108).

The Jury Instructions and Verdict

In both trials, the Court instructed the jury as to the elements of the offense as follows:

Object of the Conspiracy

> In connection with the first element of the conspiracy offense charge in count I the government must prove the existence of a conspiracy to accomplish at least one of the following objectives as charged in count I: to possess cocaine or marijuana with the intent to distribute it or to distribute cocaine or marijuana.
>
> Although you need not find the government has proved all of the alleged objects of the conspiracy in order to find that the government has met its burden as to the first element of the charge you must agree unanimously on at least one of them. It is not enough if you all agree that there was an objective to the alleged conspiracy but you cannot unanimously agree on at least one of those objectives.
>
> In proving the objectives of the charged conspiracy, the government is not required to prove that the defendant or any other alleged conspirator actually possessed cocaine or marijuana with the intent to distribute it or actually distributed cocaine or marijuana, as

long as they agree to do one of the these things as charged in count one.

There was no separate instruction as to the elements of an offense under § 841(b)(1)(A), nor that quantity must be found beyond a reasonable doubt. Additionally, the verdict form the juries took to the jury room was a general, one-question verdict form, asking for no special findings (App. D1). Finally, the juries were not asked to make a finding regarding any involvement of Meyer in murder.

Sentencing

At the first trial's sentencing hearing on December 20, 1996, the court already had available to it testimony from Rock, Carol Tenney[1] and a federal prisoner named Daniel Williams regarding the Fenner murder and Meyer's alleged involvement in it. That testimony was taken at an evidentiary hearing conducted prior to the first trial, on August 6, 1998 (R.116 at 34-43). During that hearing, Rock testified that Meyer had shot and killed Fenner sometime around April 27, 1994, offering some details of the murder plan. *Id.* His credibility, character and motivation were vigorously attacked on cross-examination (R.116 at 52-53, 77), as they were when he again testified at the sentencing hearing (R.195 at 66-68).

Tenney, who was not at the scene of the alleged murder, offered that on some unspecified evening (R.116 at 87), she had heard Meyer and Hoff say they weren't going to have to worry about "him" any more (R.116 at 88) and that a couple of days later, she asked Rock if Meyer had shot Fenner (R.116 at 89).

---

[1]Carol Tenney testified at various times during the two cases. At one point, she was married to Rock, and testified as Carol Hoff. At another time she was his former wife. She will be referred to as Carol Tenney in this petition.

"He said. . .I don't know. I don't know what you're talking about." (R.116 at 89) Her credibility also was attacked on cross-examination (R116 at 98-109), as it was at the sentencing hearing through the testimony of FBI Agent Charles Southworth, called by the government (R198 at 68-69).

Williams, testifying regarding a prison conversation with Hoff and on promise by the government that it would bring a motion to reduce his sentence (R.116 at 154), nevertheless said that he could not be sure that Hoff had told him Meyer was present when Fenner was killed (R.116 at 146).

At the sentencing hearing in front of Judge Crabb, counsel for Hoff called Joe Taylor, a federal prisoner who testified that Rock had told him he had killed three people, (R.195 at 228-29) and a prisoner named David Gibson, who testified that Rock had told him about "murders" he had committed (R.195 at 240).

Hoff testified that his son's story about Fenner's murder was a "total lie" (R.198 at 25).

Judge Crabb found that the government had proved by clear and convincing evidence that Meyer shot Fenner (R.198 at 166). In determining Meyer's sentence, the court started with a base level of 43 by applying the cross-referencing provisions of the Guidelines, U.S.S.G. § 2D1.1(d)(1), to the first degree murder provisions of § 2A1.1. The court added two points for obstruction, § 3C1.1, for a total of 45 and a sentence of life imprisonment (R.198 at 188-89).

After the second trial, Judge Shabaz held a sentencing hearing on April 9, 1999 (R.318). The government called a federal prisoner named Chance Gaines, who had testified against Meyer at the second trial with a subsequent reduction in sentence (R.318 at 67). He testified at the sentencing hearing

that Meyer had admitted murdering Fenner (R. 318 at 60). In response, Meyer called a former prisoner named Garland Lightfoot, who testified that Gaines had admitted lying to the government regarding that murder (R.318 at 49-50).

Meyer also called Tenney, who contradicted part of Rock's testimony from the first sentencing proceedings (R.318 at 41-42).

Upon completion of the testimony, Judge Shabaz noted that he had reviewed the presentence report from the first trial and had adopted the guideline calculations found in the report (R.318 at 97). Applying the law of the case doctrine, Judge Shabaz found by clear and convincing evidence that Meyer had shot and killed Fenner "and did so in order to advance the drug distribution conspiracy" (R. 318 at 98).

He specifically cited Rock's testimony at the August 6, 1998 evidentiary hearing (R.318 at 98-101) and believed that it was corroborated by Gaines' testimony at the second sentencing hearing (R.318 at 101). As Judge Crabb had done, he applied the cross-reference section of the guidelines, § 2D1.1(d)(1) for a base level of 43 and added two for obstruction, § 3C1.1 (R.318 at 101).

The court discussed a sentence without the murder enhancement, finding a base level of 32 for the drug count, plus two for obstruction and two because a weapon was used, §2D1.1(b)(1), for a total of 36 (R.318 at 105-06; App.E1). Nevertheless, the Court stated, "We start with a clean slate when we get to 43" (R.318 at 106).

The Appeal

After his second trial, Meyer, through trial counsel, filed a notice of appeal on April 15, 1999. The Seventh Circuit

appointed the undersigned as appellate counsel on May 11, 1999 pursuant to the Criminal Justice Act.

Meyer argued that his due process rights were violated because of the ineffective assistance of counsel during his second trial; that the District Court had committed clear error by enhancing his sentence based on a finding that Meyer had committed murder, and that his due process rights had been violated by the Court's enhancement based on the cross-reference to murder. In support of his due process argument regarding enhancement, Meyer submitted to the Seventh Circuit this Court's decision in *Apprendi*.

The Seventh Circuit affirmed the District Court in a published decision, *United States v. Meyer*, 234 F.3d 319 (7th Cir. 2000) (App. B1-B14). Meyer did not seek rehearing, but instead seeks a Writ of Certiorari in light of *Apprendi*.

Apprendi

On June 26, 2000, this Court issued its decision in *Apprendi v. New Jersey*, requiring that any fact other than a prior conviction that serves to enhance a defendant's sentence beyond the statutory maximum must be tried to a jury and found beyond a reasonable doubt.

At sentencing, Meyer constitutionally challenged his enhanced sentence because the Court's cross-reference to first degree murder violated his right to due process and his right to a jury trial (R. 318 at 11-12). Moreover, Meyer called the Seventh Circuit's attention to this Court's holding in *Apprendi* on July 12, 2000, by supplementing his argument with that decision pursuant to the Federal Rules of Appellate Procedure 28(j) and Seventh Circuit Rule 28(e) (App. F1).

Meyer did not challenge his enhanced sentence under the now accepted quantity issue, either before the District Court or on appeal, because the law in effect at the time in the Seventh Circuit was settled that the quantity of a controlled substance was not an element of a § 846 or § 841 offense. *See United States v. Edwards*, 105 f.3d 1179 (7th Cir. 1997); *United States v. Jackson*, 207 F.3d 910 (7th Cir. 2000). However, it is clear that this Court's decision in *Apprendi* now rejects this line of authority and Meyer's sentence should be vacated and he should be resentenced in light of *Apprendi*.

REASONS FOR GRANTING THE WRIT

In *Apprendi v. New Jersey*, this Court held that a criminal defendant's fundamental Fifth and Sixth Amendment rights require that

> [o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt . . . [I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.

Apprendi, 120 S.Ct. at 2362-2363 (emphasis added), *accord United States v. Nance*, 236 F.3d 820, 2000 WL 1880629, *3 (7th Cir. 2000); *United States v. Mietus*, 2001 WL 46572, *6 (7th Cir. 2001).

Additionally, this Court explained that its holding had been "foreshadowed" by its opinion in *Jones v. United States*, 526 U.S. 227 (1999). In *Jones*, the Court noted that "under the due process clause of the Fifth Amendment and the notice and jury trial guaranties of the Sixth Amendment, any fact (other than prior convictions) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones*, 526 U.S. at 243, n. 6.

Thus, the Court now has made clear that punishment enhancing factors are to be considered "elements" of an aggravated, separate statutory offense. *See Apprendi*, 120 S.Ct. at 2364-2365 and n.19 ("[W]hen the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. Indeed, it fits squarely within the usual definition of an element of the offense").

It is clear that punishment enhancing factors must be pled in the indictment, *accord Almendarez-Torres v. United States*, 520 U.S. 224, 226 (1998); the jury must be instructed as to them at trial, and the jury must find such factors beyond a reasonable doubt, before the defendant may be subject to an enhanced penalty associated with any aggravated offense.

On February 20, 2001, in *Patrick F. Brown v. United States*, 2001 U.S. LEXIS 1100, 69 U.S.L.W. 3551(2001), this Court granted a Petition for Writ of Certiorari sought on the same grounds as the present Petition. Brown's life sentence, based on an application of the United States Sentencing Guidelines' cross-reference to first degree murder, had been upheld by the Court of Appeals for the Fourth Circuit. *United States v. Brown*, 2000 U.S. App. LEXIS 18117 (4th Cir. 2000).

This Court vacated Brown's sentence and remanded to the Fourth Circuit for reconsideration in light of *Apprendi*.

Accordingly, this Court should grant Meyer's Petition for Writ of Certiorari and vacate the sentence imposed. The District Court in sentencing Meyer considered facts regarding Meyers' involvement in an alleged murder and in fact found Meyer guilty of first degree murder to enhance his sentence, even though Meyer was not indicted for murder, the jury considered no facts in connection with murder and the government neither sought to meet nor met the reasonable doubt standard. Thus, the Court's cross-referencing under the Sentencing Guidelines violated Meyer's due process rights under the Fifth Amendment as well as his Sixth Amendment rights to notice and trial by an impartial jury of his peers.

Those rights also were violated by the Court's consideration of facts that constituted elements of the crime charged, i.e., quantity of drugs, even though those facts were not submitted to the jury. Meyer never was charged on any grounds separate from the conspiracy charge.

I.

THE DISTRICT COURT'S USE OF THE UNITED STATES SENTENCING GUIDELINES' CROSS-REFERENCE PROVISION, U.S.S.G. § 2D1.1(d)(1), VIOLATED MEYER'S FIFTH AND SIXTH AMENDMENT RIGHTS BECAUSE THE COURT ENHANCED HIS SENTENCE BASED ON FACTS THAT WERE NOT CHARGED IN THE INDICTMENT NOR FOUND BY A JURY BEYOND A REASONABLE DOUBT.

The Fifth Amendment to the United States Constitution requires that a person not answer for a crime absent a charge of

violation in the form of an indictment. U.S. Const. amend. V. The Due Process Clause of the Fifth Amendment also "protects the accused against conviction except under proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). "The reasonable doubt standard. . .is a prime instrument for reducing the risk of convictions resting on factual error." *Id.*

In addition to the Fifth Amendment's fundamental requirements, the Sixth Amendment requires trial by an impartial jury on charges of which the defendant has notice. U.S. Const. amend. VI. The indictment must set forth every element of an offense, and "fairly inform[ ] the defendant of the charge against which he must defend . . ." *Hamling v. United States*, 418 U.S. 87, 117-118 (1974); *Almendarez-Torres*, 520 U.S. at 228; *United States v. Smith*, 230 F.3d 300, 305 (7th Cir. 2000). This Court re-affirmed all of these principles in its recent decision in *Apprendi*. 120 S. Ct. at 2362-63.

Meyer never was indicted for any degree of murder, much less first degree. Yet he was forced to answer for murder in the sentencing phase of his trial, cross-examining government witnesses, presenting witnesses of his own, all the while his liberty at stake because of this post-trial unofficial indictment for murder.

And Meyer never received his right to a jury trial on those issues. The jury never considered whether Meyer was involved in murder and never was instructed on the elements of first degree murder. Meyer never was accorded the right of having the murder charges proved beyond a reasonable doubt. Meanwhile, the government "proved" its murder case with testimony from a series of felons and jailhouse snitches.

The essential feature of a jury "is the interposition between the accused and his accuser of the common sense judgment of a group of laymen . . ." *Williams v. Florida*, 399 U.S. 78, 100 (1970). Meyer never received that buffer.

The cross-reference provision in the United States Sentencing Guidelines, U.S.S.G. § 2D1.1(d)(1), violates both the spirit and letter of *Winship* and the constitutional guarantees which trial by jury embodies. It subjects defendants like Meyer to harsh criminal penalties, over and above those imposed for the underlying offense, without affording the protections of the reasonable doubt standard. It places the crucial factual determination, the defendant's ultimate guilt for a separate offense, in the hands of a judge to be determined by a lower burden of proof.

Under the standard articulated, and furthering the principles espoused in *Winship*, U.S.S.G. § 2D1.1(d)(1) cannot pass constitutional muster. The effect is to permit the harshest penalty outside of capital punishment to be imposed, not for conduct charged and convicted, but for other "relevant conduct," so that Meyer, 32 years old at the time of sentencing, received a sentence of life in prison, rather than a Level 36, Category III imprisonment of 235 to 293 months. *See* App.E1.

When the District Court found, based on clear and convincing evidence, that an increase in the maximum punishment was appropriate, the alleged murder clearly became the tail which wags the dog of the substantive offense. *See Apprendi*, 120 S. Ct. at 2365 (citing *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986)).

Accordingly, this Court should grant Meyer's Petition for Writ of Certiorari.

II.

THE SENTENCE IMPOSED PURSUANT TO 21 U.S.C. § 841(b)(1)(A), VIOLATES THE FIFTH AND SIXTH AMENDMENTS, GIVEN THAT THE INDICTMENT DID NOT ALLEGE ANY PARTICULAR QUANTITY OF COCAINE OR MARIJUANA, THE JURY WAS NOT INSTRUCTED THAT QUANTITY WAS AN ELEMENT OF THE OFFENSE, AND THE JURY MADE NO FINDINGS AS TO DRUG QUANTITY.

The same Constitutional failings described above apply to the Court's sentencing of Meyer based on quantity of drugs.

The Grand Jury indicted only as to 21 U.S.C. § 846 based on a violation of § 841(a)(1). The indictment as charged was the only Sixth Amendment notice Meyer had of the charge against him. The indictment did not reference the separate and distinct aggravated offense set forth in Section 841(b)(1)(A), nor did it allege the distinguishing element of the aggravated offense - a quantity of Schedule I or Schedule II controlled substances of greater than 50 grams. The indictment merely charged Meyer with conspiring to possess with intent to distribute and distribution of "Schedule I or Schedule II controlled substances, specifically marijuana and cocaine; in violation of Title 21 United States Code, Section 841(a)(1)." This was the only offense of which Meyer had notice, against which he defended at trial, and of which he was convicted.

The sentencing in the present case is governed by 21 U.S.C. § 841B1(b)(C) because the indictment failed to set out a quantity charged. *See United States v. Nance*, 2000 WL 1880629 at *4. The maximum duration of a sentence under this section is 20 years.

To the extent that the District Court sentenced Meyer for a violation of a different statute, a Section 841(b)(1)(A) offense with which he was not charged, the Court effected a quasi-constructive amendment of the indictment. A constructive amendment of the indictment is reversible per se without proof of prejudice. *Stirone v. United States*, 361 U.S. 212, 217 (1960) (deprivation of right to be tried only on charges returned by grand jury "is far too serious to be treated...as harmless error"). *See also United States v. Willoughby*, 27 F.3d 263, 266 (7th Cir. 1994).

The Fifth Amendment affords a defendant due process of law. The Sixth Amendment affords a defendant the right to a trial by jury. "Taken together, these rights indisputably entitle a criminal defendant 'to a jury determination that [he] is guilty of every element of the crime with which he is charged beyond a reasonable doubt.'" *Apprendi,* 120 S. Ct. at 2356 (citing *U.S. v. Guadin*, 515 U.S. 506 (1995) and *In re Winship*, 397 U.S. 358 (1970)).

Meyer's jury was not instructed that the quantity of Schedule I or Schedule II drugs was an element of the offense charged in the indictment. The jury issued no "special findings" or a "special verdict" as to the quantity of drugs involved. The jury was instructed only as to a violation of § 841(a)(1) and § 846, and that the elements of the offense were (1) possession of Schedule I and Schedule II controlled substances, and (2) an intent to distribute.

The jury did not find beyond a reasonable doubt that Meyer possessed and distributed any quantity of Schedule I or Schedule II controlled substances. Without such a finding as to all elements of the enhanced § 841(b)(1)(A) offense, any enhanced sentence above the statutory maximum of 20 years is unconstitutional and must be vacated. The only sentence which may be imposed consistent with the Fifth and Sixth

Amendments is one pursuant to 21 U.S.C. § 841(b)(1)(C). *See U.S. v. Nance*, 2000 WL 1880629 at *4.

CONCLUSION

For all the above stated reasons, this Court should grant Petitioner-Defendant Eric R. Meyer's petition for Writ of Certiorari, vacate Meyer's sentence and remand to the Seventh Circuit for reconsideration of his sentence in light of this Court's decision in *Apprendi*.

Respectfully Submitted,

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Appendix

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APPENDIX A

United States Court of Appeals,
Seventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Eric R. MEYER and Gordon O. Hoff, Sr.,
Defendants-Appellants.
Nos. 96-4230, 97-1031.
Argued Jan. 23, 1998.
Decided June 23, 1998.
Amended Sept. 10, 1998.

Before CUMMINGS, WOOD, Jr., and RIPPLE, Circuit Judges.

HARLINGTON WOOD, Jr., Circuit Judge. Appellants, Gordon Hoff, Sr., and Eric Meyer, were convicted after a jury trial of conspiracy to distribute cocaine and to possess cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and were each sentenced to life imprisonment. They raise *1071 numerous issues on appeal. Both appellants argue that the district court erred in failing to give the jury a buyer-seller instruction and in finding that Hoff and Meyer had breached their immunity agreements. Hoff, individually, contests the admission of evidence obtained in a search of a refrigerator on his property and challenges the district court's decision to limit his cross-examination of a government witness. Additionally,

both appellants appeal the district court's sentencing determination.

I. BACKGROUND

In the fall of 1995, the FBI, together with local law enforcement officials, was investigating drug activity in northwestern Wisconsin and the disappearance, and possible murder, of three individuals thought to have connections to drug trafficking. In the course of that investigation, the authorities became aware of the activities of Appellant Gordon O. Hoff, Sr. ("Hoff"), and his son, Gordon O. Hoff, Jr. ("Rock"). On November 2, 1995, a grand jury in the Western District of Wisconsin issued an indictment charging Rock with involvement in a drug conspiracy and Hoff with intimidating a witness.

Following the indictment, Hoff's attorney approached the government to negotiate a cooperation agreement. The government entered into a written immunity agreement with Hoff on December 5, 1995. Pursuant to this agreement, Hoff was required to make "a full, complete and truthful statement regarding his involvement in violations of federal criminal statutes, as well as the involvement of all other individuals known to the defendant." In exchange, the government promised to dismiss the pending witness tampering charge against Hoff and not to charge him with any criminal violations relating to the drug conspiracy charged or with any controlled substance or money laundering violations.[2] The agreement was

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[2]The agreement refers to itself as both a "plea agreement" and an "agreement not to prosecute." To avoid confusion, and because the agreement did not require Hoff to plead guilty to any charges, we will

expressly contingent upon Hoff not having direct involvement in the commission of any homicide.

In reliance on the agreement, Hoff made incriminating statements to investigators and led them to the dead body of Dan Oestreich. Hoff told the investigators that his son Rock had murdered Oestreich and another man, Kirk Larson, because Rock believed they were informants. Hoff also stated that he believed Rock had murdered Dennis Fenner, but that he had no specific information to confirm this suspicion. Hoff admitted that he had helped Rock dispose of Oestreich's body. Hoff told investigators that he did not use cocaine and that he had never been involved in selling cocaine. He stated that Rock was active in cocaine and marijuana trafficking. Hoff also mentioned Eric Meyer, a cocaine user, as an individual who might provide further information on Rock.

Following these revelations by Hoff, Hoff's attorney contacted the FBI and told them that, in exchange for immunity, Eric Meyer would be willing to make a statement corroborating the information that Hoff had provided. Hoff's attorney made it clear that he was representing Hoff and not Meyer. On December 11, 1995, an Assistant U.S. Attorney issued a use immunity agreement letter to Meyer. On that same day, at the FBI's request, Hoff and his attorney brought Meyer to the FBI offices for an interview. When he reached the FBI offices, Meyer signed a copy of the immunity agreement, which required that Meyer make "a complete and truthful statement ... regarding [his] knowledge of and involvement in criminal

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refer to the document as Hoff's immunity agreement.

offenses including, but not limited to, controlled substance trafficking." In return, the government agreed that it would not use any of the statements that Meyer made pursuant to the agreement against him directly in any criminal proceeding. Once again, Hoff's attorney specifically stated that, although he was present, he did not represent Meyer.

Agent Southworth conducted the interview for the FBI. At the beginning of the interview, both Southworth and Hoff's attorney explained the immunity letter to Meyer and emphasized the importance of truthful information. The agent then proceeded to interview Meyer in the presence of both Hoff and Hoff's attorney. Hoff and his attorney were present during Meyer's entire interview. *1072 The agent did not specifically ask Meyer any questions about Hoff or Hoff's criminal activity. However, the agent did ask Meyer if he knew anything about Dennis Fenner's disappearance, to which Meyer claimed ignorance. During the interview, Meyer admitted to buying small quantities of drugs from Rock on several occasions, but did not tell the agent about any other drug activity.

Despite this cooperation, in February 1996, the government determined that Hoff and Meyer had not provided complete and truthful testimony as required under their agreements. Specifically, based on interviews with Rock, Rock's girlfriend, Hoff's daughter Joyell, and Kathy Modl, one of Hoff's drug customers, the government determined that Hoff and Meyer were active in a long- term conspiracy to distribute marijuana and cocaine and that Meyer had actually murdered Dennis Fenner at Hoff's direction because Hoff believed that Fenner had been planning on providing the authorities with information incriminating Hoff for drug dealing.

Due to the perceived breach of the immunity agreement by Hoff, the government believed that it was relieved of its obligation to refrain from prosecuting him. On February 28, 1996, a grand jury indicted Hoff for conspiring to distribute cocaine and to possess cocaine with the intent to distribute. The grand jury also indicted Eric Meyer on the same count. Following the indictment, the government determined that, in fact, it was Hoff who murdered Oestreich because he believed Oestreich was a police informant. The investigation also uncovered further evidence of Hoff and Meyer's extensive marijuana and cocaine trafficking.

Hoff filed a motion to dismiss the indictment, alleging that it violated his immunity agreement. On May 29, 1996, the magistrate judge held an evidentiary hearing on Hoff's motion at which the government attempted to prove that Hoff had breached the agreement. The government only called one witness, FBI Agent Southworth, who testified to the information received from Rock and the others. Hoff objected to much of Southworth's testimony as hearsay. After the hearing, the magistrate judge issued a report to the district court, recommending that the district court take further evidence on Hoff's motion. The magistrate judge believed that the government had erred in attempting to prove Hoff's breach with hearsay evidence and that the government had not presented sufficient proper evidence to show a breach.

On August 6, 1996, the district judge held a supplementary hearing on Hoff's motion to dismiss. The government presented testimony from seven witnesses. Hoff did not put on any witnesses. Following the hearing, the court

determined that the government had more than met the required preponderance of the evidence standard in establishing Hoff's breach and denied Hoff's motion to dismiss. The district court also held that this post-indictment, pretrial judicial determination of breach was sufficient, rejecting Hoff's argument that due process required a pre-indictment determination of his breach.

Meyer moved to suppress the statements he made to Agent Southworth based on his immunity agreement.[3] The prosecutors argued that Meyer had breached the agreement, thereby relieving them of their obligation not to use his statements. While noting that it was a close call, the district court held that the government had shown Meyer's breach by a preponderance of the evidence. Therefore, it found the use immunity agreement void and denied Meyer's motion to suppress.

The matter proceeded to trial where the government put on testimony from a large number of witnesses, many of whom were involved in drug activity and testified under grants of immunity. One of the government's principal witnesses was Rock, who had by this time entered into his own immunity agreement with the government. Under that agreement, Rock pled guilty to a federal drug charge in connection with his drug

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[3] Initially, Meyer moved to dismiss the indictment, claiming that he had been promised immunity from prosecution. However, after examining Meyer's immunity agreement, the district court properly concluded that the agreement was not a non-prosecution agreement but rather a promise for use immunity. Therefore, the district court viewed Meyer's motion as a motion to suppress statements, and we treat it as such on appeal.

dealings with Hoff and Meyer and received a ten-year sentence. Additionally, Rock admitted *1073 his involvement in the Larson murder and was sentenced in state court to a twenty-year prison term for second degree murder. As part of his agreement, Rock agreed to provide information and to testify against his father and Eric Meyer. Rock admitted that at the time he entered into his agreement with the government, he was aware that his father and Meyer had provided the government with information that implicated him in drug dealing and murder.

At Hoff and Meyer's trial, Rock testified that his father began supplying him with drugs for resale in 1991. Rock testified that Hoff was getting his drugs from Fenner and from David Atherton. Hoff was also supplying Eric Meyer with drugs for resale. In 1993, in exchange for a stolen motorcycle, Hoff traded the right to sell drugs to Eric Meyer to Rock. From that point on, Rock testified, Meyer began obtaining drugs from Rock for resale both for cash and on credit. As time passed, Rock began obtaining drugs from sources other than Hoff. Rock testified that he was often able to obtain drugs elsewhere at a better price than his father was offering. On those occasions, Rock generally would purchase a kilogram of cocaine with the understanding that Hoff would purchase half of the cocaine from Rock. On occasion, before delivering Hoff's portion, Rock would add a cutting agent to the cocaine to dilute it. Additionally, Rock testified that on one occasion Meyer acted as a courier for him, transporting a kilogram of cocaine to Wisconsin from Indiana.

David Atherton also testified at trial pursuant to an immunity agreement. He stated that he supplied Hoff with

marijuana and cocaine for resale and that on several occasions Hoff and Rock supplied him with drugs. Kathy Modl testified that she purchased cocaine and marijuana for resale from Hoff. Several other witnesses testified that they had purchased cocaine and marijuana from Hoff during the conspiracy period and to Meyer's involvement in drug trafficking. Since the testimony is voluminous and complex, we will address additional specific facts below when they are relevant to our analysis. At the conclusion of the trial, the jury found both Hoff and Meyer guilty on the drug conspiracy charges.

At sentencing, Judge Crabb found by a preponderance of the evidence that the drug offense involved approximately six kilograms of cocaine. Under 21 U.S.C. § 841(b)(1)(A)(ii), the defendants faced a statutory maximum sentence of life in prison. Under the Sentencing Guidelines, § 2D1.1 sets a base offense level of 32 for the conspiracy in question. With respect to defendant Hoff, the district judge considered relevant conduct under § 1B1.3(a)(1) and § 3D1.2(b) and specifically found that Hoff had murdered Daniel Oestreich, had directed Meyer to murder Fenner, had been involved in disposing of both of the bodies, and that the murders had been committed because Hoff believed that the victims were going to inform the police of his drug activities. Given these specific findings, Judge Crabb applied the cross-reference set out in § 2D1.1(d)(1) for cases in which "a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111." This cross-reference directs the court to apply § 2A1.1 (First Degree Murder) which increased Hoff's base offense level to 43, the highest level available under the Guidelines. Level 43 carries with it a sentence of life imprisonment at all criminal history levels. Judge Crabb then added three levels for Hoff's

role in the offense, two levels for obstruction of justice, and two levels for possession of firearms. Since Hoff was already at the highest offense level, these increases did not alter the length of his sentence. The court determined that Hoff had a criminal history category of four and sentenced him to life in prison.

In Eric Meyer's sentencing, § 2D1.1 again provided a base offense level of 32 for the conspiracy conviction. Judge Crabb specifically found that Meyer shot and killed Dennis Fenner and assisted in disposing of his body. She again utilized the cross-reference from § 2D1.1(d) to arrive at a base offense level of 43 under § 2A1.1. She then added two levels for obstruction. With a criminal history category of three and an offense level of 45, Meyer's sentencing range was life, and Judge Crabb sentenced Meyer to life imprisonment.*1074

II. ANALYSIS

A. Buyer-Seller Jury Instruction

Hoff and Meyer assert that the district court erred in failing to instruct the jury that a mere buyer-seller relationship is insufficient to establish membership in a conspiracy. They contend that this failure deprived them of the opportunity to present a theory of defense. Appellants included a buyer-seller instruction with their proposed jury instructions. At the final pretrial conference, the magistrate judge went through the proposed instructions with the parties. In making his recommendations to the district judge, the magistrate included a buyer-seller instruction which stated "[p]roof that a defendant merely bought or sold drugs from alleged members of the alleged conspiracy is not sufficient, without more, to establish

a defendant's guilt," but noted that the district judge would need to make the final determination on the instruction after hearing the evidence at trial. At the instructions conference following the close of evidence, the district judge considered whether to include the buyer-seller instruction. After hearing argument from both sides, the district judge rejected the instruction, stating

> I would like to give the defendants an opportunity to argue anything that is reasonable, but I just don't think there is anything reasonable about a buyer/seller instruction in this case. This is just not the sort of case in which a jury could ever find that that was the only relationship. If they believe the witnesses at all, they have to believe that this was more than a buyer/seller relationship so I will not give that instruction.

We review the district court's decision that a defendant has failed to present sufficient evidence to become entitled to a jury instruction on a theory of defense de novo. United States v. Turner, 93 F.3d 276, 285 (7th Cir.1996) (citing United States v. Bastanipour, 41 F.3d 1178, 1183-84 (7th Cir.1994)).

A defendant must satisfy a four-part test before he is entitled to a jury instruction to present a theory of defense. He must show that (1) the proposed instruction is a correct statement of the law; (2) the evidence in the case supports the theory of defense; (3) the theory of defense is not already part of the charge; and (4) failure to include the proposed instruction would deny the defendant a fair trial. Turner, 93 F.3d at 285

(citing United States v. Schulte, 7 F.3d 698, 700 (7th Cir.1993)).

The government concedes, and we agree, that the proposed instruction represented a correct statement of the law in this circuit. See United States v. Lechuga, 994 F.2d 346, 349 (7th Cir.1993) (en banc). However, in order to be entitled to the instruction, the defendants must satisfy all four requirements. The district court held that the defendants failed to meet the second prong since there was no foundation in the evidence to justify giving the buyer-seller instruction. Hoff and Meyer contend that this ruling was erroneous. The second prong will be fulfilled if there is evidence sufficient to "create a reasonable doubt of guilt in the mind of a reasonable juror." Tyson v. Trigg, 50 F.3d 436, 448 (7th Cir.1995) (citing Mathews v. United States, 485 U.S. 58, 63, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988)); see also United States v. Perez, 86 F.3d 735, 736 (7th Cir.1996).

Appellants point to several specific areas of evidence which they assert support the buyer-seller theory of defense. Hoff cites Rock's testimony, together with the fact that no witness testified to making an agreement with Hoff beyond an agreement to buy, sell, or pay for drugs, to support his assertion. For further support, Hoff cites United States v. Pedigo, 12 F.3d 618 (7th Cir.1993). However, Pedigo is easily distinguishable from the present case. In Pedigo, the parties conducted only two drug transactions, and these transactions were completed within a few hours of one another. Id. at 625. In the present case, the evidence showed that Hoff and Rock entered into numerous drug transactions over a span of more than four years. Depending on the availability of the drugs,

Hoff would sometimes act as buyer and sometimes as seller. These transactions involved large quantities of narcotics. Hoff argues Rock's testimony supports a theory that the father and son were actually competitors rather than coconspirators. While Rock testified that he sold drugs to his father at a profit and that he diluted cocaine before *1075 selling it to his father, he also testified that he sold drugs for his father and consulted his father regarding drug buys. Rock testified that the profit he made off of sales to his father was small and that he viewed this profit as compensation for the risk and transportation involved in securing the drugs. There is no foundation in the evidence to support the proposition that the only relationship that existed between Hoff and Rock was that of a buyer and seller. Since Hoff fails to satisfy the second requirement, we need not address the remaining two prongs of the test. The district court correctly declined to give the jury a buyer-seller instruction with respect to Appellant Hoff.

Meyer, too, claims that he was entitled to a buyer-seller instruction. He points to Rock's testimony and his own statements to the FBI which the government introduced at trial as creating an evidentiary foundation to support the instruction. At trial, Rock testified that he supplied Meyer with drugs for redistribution and that sometimes Meyer would take these drugs on credit and would pay Rock after he sold them. Also, Rock testified that, on one occasion, Meyer transported a kilogram of cocaine from Indiana to Wisconsin for him. In exchange for Meyer assuming the risk of transporting the cocaine, Rock agreed to forgive Meyer's past drug debts totaling approximately $1500 and to give him a truck. There was also evidence that Meyer helped in the construction of an underground bunker to grow marijuana, aided in the

modification of automobile fuel tanks to allow for concealed transportation of illegal drugs, and that on one occasion, Meyer stated that he was Hoff's "lieutenant." However, while these factors support a finding of conspiracy, there is also evidence in the record to the contrary. Significantly, after describing the relationship between himself and Meyer, on cross-examination Rock testified that Eric Meyer was just one of his "customers" for marijuana and cocaine. Rock distinguished between his relationship with his father, with whom he would discuss business decisions, and Eric Meyer. Rock stated that he would not discuss prices or sources with Meyer and that Meyer did not have any control over Rock's end of the business. Rock testified concerning Meyer, "[h]e just bought cocaine from me." The evidence showed that Hoff also described Meyer as a drug "customer." Additionally, at trial, the government introduced Meyer's statement to the FBI in which Meyer only admitted to buying small quantities of drugs from Rock on several occasions.

Given the record as a whole, had the jury been properly focused on the distinction between a conspiracy and a mere buyer-seller relationship, it reasonably may have found that Meyer merely purchased drugs from the conspiracy. While the purchase of drugs constitutes a substantive drug offense, Meyer was charged only with two counts of conspiracy and not with any substantive drug offenses. A conspiracy charge requires the government to prove agreement to commit a crime other than the crime that consists of the sale itself. United States v. Thomas, 150 F.3d 743, 746 (7th Cir.1998) (per curiam). Agreement cannot be equated with repeated drug transactions. Id. A buyer-seller instruction "reminds juries that distribution of drugs is not itself conspiracy, although a history of

transactions may be evidence of conspiracy." Id. There was sufficient evidence with regard to Eric Meyer to support a buyer-seller instruction in this case. Additionally, the buyer-seller theory was not included elsewhere in the charge. The government argues that the district court's definition of conspiracy together with the instruction that "mere association with conspirators or mere approval, presence, or knowledge of a conspiracy or conspiratorial acts are not sufficient, without more, to establish a defendant's guilt" presented the theory to the jury by requiring that the jury find conspiracy membership beyond a reasonable doubt. This is not an unreasonable argument; however, after examining the court's instructions as a whole, we must conclude that this general instruction was not sufficient to convey the mere purchaser theory to the jury. Since the evidence was such that a reasonable jury could have found that Meyer was merely a buyer from the conspiracy, the failure to give a buyer- seller instruction denied Meyer a fair trial. Therefore, the district court erred in refusing to give the proposed buyer-seller instruction with respect to Appellant Meyer, and Meyer's conviction must be reversed. *1076

We can readily understand the district judge's reluctance to give Meyer the benefit of a buyer-seller instruction having heard all the testimony about the extensive and violent drug dealing of the parties. Even though the district judge was not satisfied with the evidentiary basis for the instruction, there was sufficient evidence to let the jury make that factual determination. In a dubious case it may often be better to give the proposed instruction and let the jury sort it out.

B. Hoff's Immunity Agreement

Hoff raises two issues on appeal dealing with his immunity agreement. First, Hoff asserts that the fact that the prosecutors indicted him without first securing a judicial determination that Hoff had breached the agreement violated his right to due process. Secondly, Hoff argues that the district court abused its discretion in reopening the evidentiary hearing on his motion to dismiss the indictment, thereby giving the government a second chance to prove that Hoff had breached the immunity agreement. We review these two arguments separately.

1. Due Process Argument

After the government had entered into its agreement with Hoff and had received information from him, further investigation uncovered convincing evidence that Hoff had withheld information from investigators and had given false information. Investigators determined that, contrary to his statements to authorities, Hoff was involved in a long-term conspiracy to distribute both marijuana and cocaine and that Hoff had ordered the murder of Dennis Fenner. The government, believing that Hoff was in breach of the immunity agreement, indicted him. Hoff filed a motion to dismiss the indictment based on his immunity agreement. The magistrate judge held an evidentiary hearing to determine whether Hoff had breached the agreement, thereby releasing the government from its obligations under the agreement. After receiving the magistrate's report and recommendation, the district judge held a supplementary hearing on Hoff's motion. The district judge determined that Hoff had indeed breached his promise to the government and denied the motion to dismiss.

Hoff asks this court to reverse his conviction and to dismiss the case based on the timing of the evidentiary hearings. He asserts that due process required a pre-indictment hearing to determine breach. The government contends that a preindictment hearing is not constitutionally required and asserts that the district court's pretrial hearing to determine whether Hoff had breached his agreement with the government was sufficient to satisfy due process. We review Hoff's constitutional claim de novo. Turner, 93 F.3d at 286.

A fundamental requirement of the due process clause is that an individual receive notice and the opportunity for a hearing before he is deprived of a significant property interest. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). With respect to immunity agreements, due process "requires prosecutors to scrupulously adhere to commitments made to suspects in which they induce the suspects to surrender their constitutional rights in exchange for the suspects giving evidence that the government needs against others which simultaneously implicates themselves." United States v. Eliason, 3 F.3d 1149, 1153 (7thCir.1993). However, if the suspect fails to fulfill his obligations under the contract, the government is relieved of its reciprocal obligations. United States v. Verrusio, 803 F.2d 885, 888 (7th Cir.1986) (citations omitted). "[D]ue process prevents the government from unilaterally determining that the defendant breached the ... agreement." Id. Rather, the government must obtain a judicial determination of the defendant's breach. See id. In the present case, Hoff does not contend that the district court erred in determining that he had breached the agreement, he merely contests the timing of that determination.

Absent exigent circumstances, an individual is entitled to a judicial determination of his breach before being deprived of his interest in the enforcement of an immunity agreement. Verrusio, 803 F.2d at 888. In Verrusio, we held that, under the facts of the case, a post-indictment evidentiary hearing on the defendant's alleged breach was sufficient to satisfy due process, because the benefit *1077 of Verrusio's bargain was avoiding the risk of conviction on certain charges. Thus, Verrusio would be denied his interest in enforcing the agreement only if he were tried on those charges. The mere fact of an indictment did not deny Verrusio the benefit of his bargain. Id. at 889.

Hoff attempts to distinguish his agreement from the one in Verrusio. He argues that the agreement in Verrusio was a non-conviction agreement while his agreement promised non-prosecution. However, in making this assertion, Hoff fails to note the similarity in the terms of the two agreements. In Verrusio, the plea agreement provided that, in exchange for the defendant's performance, the government would dismiss eight pending charges and would not file any additional known charges or newly discovered charges occurring out of the same criminal conspiracy. Id. at 886-87 n. 1. Likewise, Hoff's agreement provided that, in exchange for Hoff's performance, the government would dismiss the charge currently pending against him and would not charge him with any other violations relating to the same criminal conspiracy or with other drug or money laundering violations. Notably, neither agreement addressed a particular procedure for the government to follow in the event of a perceived breach by the defendant. See id. at 899 n. 3 (noting that parties could contract for a pre-indictment hearing in the event of a perceived breach). In fact, Hoff's agreement provided "[i]f the government at anytime determines

that the defendant is being less than fully cooperative or is not truthful, then the United States has the option of declaring this plea agreement void ...."

While Hoff attempts to distinguish his agreement from the agreement in Verrusio by referring to them by different names, the terms of the agreements provide for the same performance by the government. The benefit of Hoff's bargain, like Verrusio's, was to avoid the risk of conviction on charges arising from the drug conspiracy or from any money laundering or controlled substance violations.[4] The fact that Verrusio agreed to plead guilty to one count in addition to cooperating with the government while Hoff only agreed to cooperate alters the advantage for which the government bargained, but does not change the benefit of Hoff's bargain. In accordance with due process, Hoff was entitled to a judicial determination that he had breached the agreement before being subjected to the risk of conviction. The district court's pretrial evidentiary hearing satisfied this requirement. Nevertheless, we again stress that, in cases such as these, the preferred procedure, absent exigent circumstances, would be for the government to seek relief from its obligations under the immunity agreement prior to indictment. Since the government is required to obtain a judicial determination of a defendant's breach prior to trial, it is

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[4]This finding is consistent with the treatment nonprosecution agreements have received in other circuits under similar circumstances. See, e.g., United States v. Bailey, 34 F.3d 683, 690 (8th Cir.1994) (holding that, under a non-prosecution agreement, a defendant bargains to avoid the "risk of going to trial," i.e., conviction and punishment, and not to avoid trial); United States v. Bird, 709 F.2d 388, 392 (5th Cir.1983) (stating that a promise not to prosecute is in essence a grant of immunity from punishment).

but a de minimis inconvenience for the government to secure that determination pre-indictment. See United States v. Ataya, 864 F.2d 1324, 1330 n. 9 (7th Cir.1988). A pre-indictment hearing would curtail prosecutorial overreaching in drafting ambiguous immunity agreements and, in cases in which the defendant had fulfilled his obligations under the agreement, would help to prevent the government from using the threat of criminal prosecution "to achieve by coercion what it could not achieve through voluntary negotiation." Id. On the facts of the present case, however, Hoff received all of the protection demanded by due process.

2. Reopening of Evidentiary Hearing

As noted above, when the government indicted Hoff for the second time, Hoff filed a motion to dismiss the indictment based on his immunity agreement. The magistrate judge held an evidentiary hearing, as allowed under 28 U.S.C. § 636(b)(1)(B). At this hearing, the government attempted to prove breach through the testimony of only one witness, Agent Southworth. Hoff's attorney objected to much of Southworth's testimony as hearsay. The *1078 magistrate, in his report and recommendation to the district judge, stated that he believed the government had erred in trying to prove Hoff's breach with hearsay evidence. He noted that the government had failed to produce sufficient non-hearsay testimony to prove a breach and recommended that Judge Crabb hear further evidence on the matter. Judge Crabb held a supplementary evidentiary hearing on Hoff's motion at which time the government called seven witnesses. Following this hearing, Judge Crabb determined that the government had shown breach by more than the required

preponderance of the evidence standard and denied Hoff's motion to dismiss.

Hoff argues that the district court erred in reopening the evidentiary hearing on Hoff's motion to dismiss, thereby giving the government a second chance to prove that Hoff had breached the immunity agreement. We review for abuse of discretion. United States v. Turk, 870 F.2d 1304, 1307 (7th Cir.1989). We will reverse only if "it is clear that no reasonable person could concur" in the district judge's decision. Ladien v. Astrachan, 128 F.3d 1051, 1056 (7th Cir.1997) (internal quotations and citations omitted). " 'The district court's decision must strike us as fundamentally wrong for an abuse of discretion to occur.' " Id. (citing Anderson v. United Parcel Service, 915 F.2d 313, 315 (7th Cir.1990)).

In the present case, the district judge did not abuse her discretion in deciding to reopen the evidentiary hearing. Under 28 U.S.C. § 636(b)(1), when a district judge designates a magistrate to conduct an evidentiary hearing, the district judge "may also receive further evidence" on the matter. Judge Crabb's decision to exercise this statutory power cannot be viewed as clearly unreasonable or fundamentally wrong. Hoff's claim fails.

C. Meyer's Immunity Agreement

Meyer disputes the district court's decision not to suppress his statements given to the FBI pursuant to his use immunity agreement. Under the agreement, Meyer was to provide "a complete and truthful statement" regarding his "knowledge of and involvement in criminal offenses including,

but not limited to, controlled substance trafficking." The agreement further stated that the immunity agreement would be void if Meyer provided the government with materially false information or if he intentionally "withheld material information at any point in time." In exchange, the government promised not to use any of Meyer's statements or any information he provided against him directly in any criminal prosecution.

On appeal, Meyer argues that the district court erred in concluding that his immunity agreement bound him to provide incriminating information against Hoff. We review this factual determination regarding the scope of Meyer's immunity agreement for clear error. See United States v. Nelson, 851 F.2d 976, 978 (7th Cir.1988). We will reverse only if, after a comprehensive review of the evidence, we are left with "the definite and firm conviction that a mistake has been made." United States v. Duguay, 93 F.3d 346, 349 (7th Cir.1996) (internal quotations and citation omitted).

Meyer's agreement expressly required Meyer to make a complete and truthful statement regarding his knowledge of criminal offenses and did not contain any exceptions. Meyer contends that the fact that Agent Southworth allowed Hoff and his attorney to remain in the room during Meyer's interview implicitly modified the agreement in such a way that Meyer was no longer required to provide information that would have incriminated Hoff. For support, Meyer points to Southworth's testimony at the sentencing hearing that he did not ask Meyer any questions about Hoff's criminal activity because he did not think he would get a good answer with Hoff and his attorney sitting in the room. However, while this situation is unusual, it

did not necessarily alter the scope of Meyer's agreement. Agent Southworth testified that he had attempted several times to interview Meyer alone, but that Meyer would not agree to it. Additionally, the plain language of the agreement requires complete and truthful testimony, without exception, and this point was emphasized to Meyer at the beginning of the interview. Even if there may be some evidence to support Meyer's view of modification, there is also ample *1079 evidence to the contrary. The district court's decision to admit Meyer's statement was not clearly erroneous.

D. Refrigerator Search

During the course of the joint drug and murder investigation, local law enforcement officials received a warrant to search a property known as the Ogg farm for two vehicles registered to Dennis Fenner. This search warrant did not indicate the names of the owners or residents of the Ogg farm. On May 2, 1994, county investigators executed the search warrant. During the search, one investigator noticed a refrigerator located about eight to ten feet from a mobile home on the premises. The refrigerator was partially covered by a tarp and was tied to a handcart. The officer lifted the tarp to inspect the refrigerator more closely. There was not a freezer door, so when the officer lifted the tarp, he was able to see into the freezer compartment where he observed drug paraphernalia, including a scale and baggies, and a cylindrical container. Further investigation disclosed a small amount of marijuana inside the container. Investigators used the evidence from the May 2 search to obtain another warrant on May 3, 1994. The May 3 search warrant authorized the search of the mobile home

on the Ogg farm property which it identified as Hoff's residence.

Hoff filed a motion to suppress evidence, claiming that the search of the refrigerator was outside the scope of the warrant in violation of the Fourth Amendment. Hoff attached a copy of the May 2 and 3 search warrants to his motion in an attempt to establish that the property searched was his residence. In response to Hoff's motion, the government contended that Hoff lacked standing to contest the search. To support this assertion, the government submitted a transcript from a December 1994 Dunn County Court proceeding in which Hoff denied ownership of the refrigerator.[5] Hoff failed to produce further evidence or to file an affidavit asserting standing, choosing instead to rely only on his motion and the search warrants. After evaluating all of the evidence, Judge Crabb noted that Hoff had not produced any evidence that he owned the mobile home or that he was occupying it at the time of the search despite the fact that he was on notice that he had to come forward with evidence to prove standing. She concluded that Hoff had failed to meet his burden of establishing a requisite interest in the refrigerator, and therefore, he lacked standing to object to its search.

We review the district court's findings of fact after a suppression hearing for clear error, while reviewing conclusions

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[5]The government failed to meet a filing deadline set by the magistrate in submitting the state court transcript. The magistrate judge ruled that the government's submission was untimely and refused to consider it. The district court examined the matter and decided that the untimely material could be considered.

of law and mixed questions of law and fact de novo. Duguay, 93 F.3d at 349-50. The party seeking suppression bears the burden of establishing that he had a reasonable expectation of privacy in the area and items searched. United States v. Ruth, 65 F.3d 599, 604 (7th Cir.1995). In order to establish a reasonable expectation of privacy, the party must show that he had an actual, subjective expectation of privacy that society is prepared to recognize as reasonable. Id. (citation omitted).

Since the police officers had a valid warrant to search Hoff's property for vehicles, Hoff challenges only the additional search of the refrigerator. Hoff argues that he had standing to challenge this search solely because the refrigerator was within his curtilage, relying on the two search warrants to prove that the refrigerator was within his curtilage. Hoff did not testify or submit an affidavit regarding his expectation of privacy in the refrigerator.

Hoff cites Alderman v. United States, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969), to support his argument. In Alderman, the Court held that "[i]f the police make an unwarranted search of a house and seize tangible property belonging to third parties ... the homeowner may object to its use against him, not because he had any interest in the seized items as 'effects' protected by the Fourth Amendment, but because they were the fruit of an unauthorized search of *1080 his house, which is itself expressly protected by the Fourth Amendment." Id. at 176-77, 89 S.Ct. 961. However, the Court was quick to note that if the police were to enter a house "pursuant to a valid warrant authorizing the seizure of specified gambling paraphernalia but discover illegal narcotics in the process of the search, the narcotics may be seized and

introduced in evidence in the prosecution of the homeowner, whether the narcotics belong to him or to a third party." Id. at 177 n. 10, 89 S.Ct. 961.

In the present case, the police entered Hoff's curtilage pursuant to a valid warrant. Therefore, Hoff cannot raise a claim based on an unauthorized search of his curtilage. Hoff cannot assert a protected interest in the refrigerator based solely on the fact that the refrigerator was within his curtilage. He must establish that he had a reasonable expectation of privacy in the refrigerator. As noted above, Hoff does not claim that the refrigerator was his or assert that he had any expectation of privacy in the refrigerator apart from the fact that it was within his curtilage.[6] As was the case in Ruth, Hoff attempts to meet his burden by relying on the search warrants and testimony by a law enforcement officer. See Ruth, 65 F.3d at 604-05. In Ruth, we noted that since the existence of a privacy interest "depends, in part, on the defendant's subjective intent" it is "almost impossible" to establish a reasonable expectation of privacy without an affidavit or testimony from the defendant. Id. at 605. In the present case, Hoff fails to present any evidence showing that he had a subjective expectation of privacy in the refrigerator. Therefore, Hoff has failed to establish that he had

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[6]Hoff may be reluctant to assert an interest in the refrigerator, due to the incriminating nature of its contents. However, while any of Hoff's pretrial assertions may be used against him indirectly at trial, he is afforded some protection since it is clear that testimony given to meet standing requirements for motions to suppress cannot be used as direct evidence against the defendant at trial on the question of guilt or innocence. See Simmons v. United States, 390 U.S. 377, 390, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968).

a reasonable expectation of privacy in the refrigerator, and he does not have standing to challenge the search.[7]

E. Cross-Examination of Rock

At trial, the government called Rock as one of its principal witnesses against Hoff. On direct, the prosecutor established that Rock was serving a ten-year prison sentence after pleading guilty to federal drug charges. Rock also testified that he was serving a twenty-year state sentence for murder. Hoff's attorney sought to establish Rock's bias on cross-examination by showing that Rock knew that Hoff had provided the police with information that Rock was involved in drug trafficking and had committed two premeditated murders in furtherance of his drug activity. The district court allowed defense counsel to ask Rock if he was aware that Hoff had given the police information about Rock's involvement in drug dealing and the one murder for which Rock was serving the twenty-year sentence. The district court did not allow defense counsel to probe further into the details of Hoff's accusations against Rock or to explore the fact that the information that Hoff provided to the police exposed Rock to the possibility of two consecutive life sentences or the federal death penalty.

Hoff contends that the district court erred by denying him the opportunity to fully cross-examine Rock regarding Hoff's accusations. Hoff asserts that this denial prevented him from exposing the full extent of Rock's bias against him. We

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[7]Since Hoff failed to present evidence sufficient to meet his burden of proof, we need not determine the effect of the state court transcript submitted by the government.

review for abuse of discretion. United States v. Torres, 965 F.2d 303, 310 (7th Cir.1992).

The Supreme Court has noted that exposing possible bias is "a proper and important function of the constitutionally protected right of cross- examination." Delaware v. Van Arsdall, 475 U.S. 673, 678-79, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) (citations omitted). However, the Confrontation Clause does not prevent a trial judge from imposing limits on the extent and scope of cross-examination. In fact, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based *1081 on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Id. at 679, 106 S.Ct. 1431.

In his reply brief, Hoff cites Lindh v. Murphy, 124 F.3d 899 (7th Cir.1997), to support his argument. However, Hoff fails to note an important distinction between his case and Van Arsdall and Lindh. In both Van Arsdall and Lindh, the lower court was reversed because it prohibited all inquiry into the possibility of bias. Van Arsdall, 475 U.S. at 679, 106 S.Ct. 1431; Lindh, 124 F.3d at 901. In the present case, Hoff was allowed to explore bias by exposing the fact that Rock was serving a twenty-year prison sentence for murder because of information Hoff provided to the police and that Rock was not happy about the situation. As we have noted, cross-examination has no natural limits, and the trial judge must therefore exercise judgment in deciding when the point of diminishing returns has been reached, or passed--a judgment that will depend on the particulars of each case, and on such unreviewable

imponderables as the judge's assessment of the jury's comprehension and attention span. United States v. Akinrinade, 61 F.3d 1279, 1285 (7th Cir.1995) (quoting United States v. Herrera-Medina, 853 F.2d 564, 566 (7th Cir.1988)). In the present case, the district judge allowed the defense to establish, during an extensive cross-examination, that Rock had reason to be biased against his father since Hoff had provided the police with information incriminating Rock. Hoff argues that the more evidence he could present, the greater the bias he would be able to establish. However, it is up to the district judge to determine when the point of diminishing returns has been reached. Having allowed evidence of Rock's basic reason for bias, the district judge reasonably determined that additional evidence would be repetitive. This decision did not constitute an abuse of discretion.

F. Sentencing Issues

Hoff[8] argues that the district court violated his right to due process by enhancing his drug conspiracy sentence based on alleged participation in murders during the course of the conspiracy and asks us to vacate his sentence and to remand the case for resentencing. Hoff does not contend that the district court incorrectly applied the Sentencing Guidelines; rather he argues that the way in which the Guidelines operate to create a life sentence in his case is unconstitutional. Since it implicates constitutional issues, we review the district court's sentencing determination de novo. United States v. Neely, 980 F.2d 1074, 1080 (7th Cir.1992).

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[8]Since we must reverse and remand Meyer's conviction on other grounds, we do not address his sentencing claim.

Hoff asserts that the Sentencing Guidelines' cross-reference under § 2D1.1(d)(1) to first degree murder violates his right to due process, since he was never charged or convicted by a jury for murder. Even though the defendants were not tried for murder, Judge Crabb was able to consider evidence of the murders as "relevant conduct" under § 1B1.3(a)(1) which provides that cross-references in Chapter Two should be determined based on "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant ... that occurred during the commission of the offense of conviction ...." Hoff does not argue that the murders did not constitute relevant conduct under the Guidelines or that relevant conduct cannot be considered to enhance a defendant's sentence. Instead, he asserts that the application of the Guidelines is unconstitutional, since murder is "different" than other offenses. Hoff argues that no person should be sentenced for murder without first being convicted of murder after a jury trial.

While we realize that murder is the most odious of crimes, it is clear that "sentencing judges may look to the conduct surrounding the offense of conviction in fashioning an appropriate sentence, regardless of whether the defendant was ever charged with or convicted of that conduct, and regardless *1082 of whether he could be." United States v. Dawn, 129 F.3d 878, 884 (7th Cir.1997) (collecting cases). Additionally, we must note that "taking into account conduct related to the offense of conviction in sentencing is not the same thing as holding the defendant criminally culpable for that conduct." Id. (citations omitted). At sentencing, a defendant does not have a right to have his sentence determination confined to facts

proven beyond a reasonable doubt. McMillan v. Pennsylvania, 477 U.S. 79, 92, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986).

Hoff relies on United States v. Lombard, 72 F.3d 170 (1st Cir.1995), to support his contention that a sentence enhancement for murder is so severe that it raises grave constitutional questions concerning the lesser procedural protections available at sentencing. In so doing, he ignores United States v. Masters, 978 F.2d 281 (7th Cir.1992), which we find controlling. A key distinction between the present case and Lombard is that the statute governing Lombard's sentencing, 18 U.S.C. § 924(e), set out a statutory minimum sentence, but did not have a stated statutory maximum. Lombard, 72 F.3d at 178; 18 U.S.C. § 924(e). The sentencing in the present case is governed by 21 U.S.C. § 841(b)(1)(A)(ii), which sets out an express statutory maximum sentence of life. As we noted in Masters, "[c]onviction at trial supplies all of the justification the Constitution requires for depriving the defendant of liberty for any term up to the maximum prescribed by statute." Masters, 978 F.2d at 286. "How much of that time to grant back in sentencing, and what procedures to use when doing so, are legislative rather than constitutional choices." Id. In the present case, Hoff's life sentence was within the expressly stated statutory maximum for his offense of conviction.

We have noted that increased precautions may be necessary in cases in which the use of cross-references dramatically alters the balance between trial and sentencing. See Masters, 978 F.2d at 287. In the present case, without consideration of the murders, Hoff would have scored an offense level of 39. An increase from level 39 to level 43 is not

the type of drastic increase which would allow the sentencing enhancement to become the tail which wags the dog of the substantive offense. See id. Judge Crabb's application of the Sentencing Guidelines did not violate Hoff's constitutional rights.

III. CONCLUSION

Therefore, the decision of the district court is AFFIRMED with respect to Appellant Hoff. While we AFFIRM the judgment of the district court with respect to Appellant Meyer's immunity agreement claim, we REVERSE Meyer's conviction on his jury instruction claim and REMAND his case for a new trial.

C.A.7 (Wis.),1998.
U.S. v. Meyer

APPENDIX B

In the
United States Court of Appeals
for the Seventh Circuit

No. 99-1919
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ERIC R. MEYER,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 96 CR 10-**John C. Shabaz**, *Chief Judge.*

ARGUED NOVEMBER 12, 1999-
DECIDED DECEMBER 4, 2000

Before FLAUM, *Chief Judge,*
and RIPPLE and ROVNER, *Circuit Judges.*

ROVNER, *Circuit Judge. Two* years ago, this court reversed Eric Meyer's conviction for conspiracy to distribute a controlled substance and granted him a new trial based on an instructional error. United States v. Meyer,157 F.3d 1067 (7th Cir. 1998),*cert. denied*, 526 U.S. 1070, 119 S. Ct. 1465 (1999).

A second jury convicted him again on the conspiracy charge. In this appeal, Meyer argues that his trial counsel was ineffective for failing to ask for a mistrial, or in the alternative, a cautionary instruction, after a witness alluded to "murder cases," that the evidence was insufficient to support the district court's sentencing, determination. that he committed a murder in the course of the drug conspiracy, and that the court violated his due process rights when it cross-referenced the murder guideline. We affirm.

I.

We assume familiarity with our opinion in the previous appeal and confine our discussion of the facts to those most pertinent to the issues Meyer has raised. From 1991 until 1995, Meyer participated in a narcotics distribution conspiracy whose members included his co-defendant, Gordon Hoff, Sr. ("Hoff") and Hoffs son, Gordon Hoff, Jr., known to his associates as 'Rock." At the outset of the conspiracy, Hoff supplied both Rock and Meyer with cocaine (and marijuana) for resale to others. Rock developed his own sources of cocaine, however, and at times was able to buy it at prices lower than his father offered him. Indeed, on occasion Rock supplied Hoff with cocaine rather than the other way around. Eventually, in or around August of 1993, Hoff ceded Meyer as a customer to Rock in exchange for a Harley-Davidson motorcycle that Rock had taken from a friend in an insurance scam. Thereafter, Meyer obtained his narcotics on an almost daily basis from Rock (often on credit). On occasion, he lent a hand when Rock, Hoff, or one of their associates needed assistance with transporting cocaine, collecting drug debts, and like tasks.

Dennis Fenner, Hoffs source for marijuana, was one of several people who were murdered in the course of the conspiracy. In the immediate wake of his indictment late in

1995, Hoff, who was cooperating with the authorities in exchange for immunity, said that he suspected Rock of the murder. But investigators later concluded that Meyer had killed Fenner, at Hoffs behest.

At a pre-trial evidentiary hearing in 1996, Rock indicated that in 1994, Hoff (who had recently had a search warrant executed on his property) wanted Fenner killed for fear that he might expose Hoff and his co-conspirators to the police.

Rock testified that Hoff arranged a meeting with Fenner at Rock's farm near Osseo, Wisconsin in the middle of one night in late April 1994, and Hoff asked Rock to drive Meyer to that meeting. Rock did so, and he noticed that Meyer had a nine-millimeter Smith & Wesson handgun with him that had once belonged to Rock. Rock and Meyer arrived at the farm first. After giving Meyer a brief tour of an abandoned house on the property, the two men returned outdoors. Rock walked around to the back of the house to relieve himself. While he was so engaged, Rock heard an automobile come up the drive toward the house; he then heard two car doors slam shut, and a moment later he heard several gunshots. When he walked out from behind the house, Rock saw Fenner's body on the ground. Meyer was standing approximately five feet away with a gun in his hand and Hoff, who was standing next to Meyer, was congratulating Meyer, saying that "it had to be done." R. 116 at 42. Rock testified that he helped the other two men burn Fenner's body over a period of six hours and dispose of some of the ashes in a creek. The three of them then left together in Rock's 1976 Chevrolet Blazer. Hoff later killed Fenner's dog in order to avert suspicion that Fenner had been the victim of foul play. R. 116 at 45, R. 195 at 39.

At Meyer's first sentencing hearing in December 1996, Rock again testified on the subject of Fenner's murder. At that

time he added that Hoff had given Meyer a motorcycle because Meyer had killed Fenner. R. 195 at 38, 42.

Rock was by no means a witness of unimpeachable virtue. Aside from having helped Hoff and Meyer (at the least) to dispose of Fenner's body, Rock admitted that he had killed another individual, Kirk Larson, and that he was serving a twenty-year prison term for that murder. R. 195 at 65.[9] Rock told the authorities that he killed Larson because Larson had an affair with Carole Tenney. R. 116 at 52-53. (At the time of the Larson murder Tenney was Rock's girlfriend; by the time that the pre-trial evidentiary hearing took place, she was Rock's wife.) Rock acknowledged, however, that his father claimed Rock had killed Larson because he was concerned that Larson might expose his drug-dealing (R. 116 at 51; id. at 71); and Rock agreed that he would have received a more severe sentence for the murder if his father's version were accurate (R. 116 at 53). Tenney, in fact, denied having had an affair with Larson. R. 116 at 93. Rock also acknowledged that his father had turned him in for murder and drug-dealing, and that he did not begin to cooperate with the authorities until Hoff and Meyer had already implicated him in the drug conspiracy. R. 315 at 7071. Moreover, after Rock pleaded guilty to the federal conspiracy charge, he received a sentence of only ten years, as compared to the life terms that Hoff and Meyer eventually received. Rock also admitted that he owned and had "paged through" books that described how to kill someone silently, how to dispose of bodies, and how to be a hit man. R. 315 at 77. He admitted that he did not like Fenner. "He was a prick," Rock testified. R. 195 at 66. He admitted as well that he owned a

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[9] When he testified at Meyer's first sentencing hearing, Rock acknowledged that he had burned Larson's body at his farm on the very spot that Fenner's body was incinerated. R. 195 at 67.

nine-millimeter handgun and that he had threatened to kill another individual with that gun at the Osseo farm, where of course Fenner was slain. R. 195 at 67-68. Indeed, Rock admitted that after he killed Kirk Larson, he killed Larson's dog-just as Hoff, according to Rock, had killed Fenner's dog after Meyer killed Fenner., R. 195 at 66. Two prisoners who testified on Meyer's behalf at his first sentencing hearing reported that Rock had claimed responsibility for multiple murders (although not specifically Fenner's). R. 195 at 228-29, 240, 242-43. Judge Crabb described Rock as "a seriously disturbed, violent young man[.]" R. 198 at 187. For his part, Rock's father (Hoff) testified that Rock's account of the Fenner killing was a "total lie". R. 198 at 25.

Carole Tenney Hoff ("Tenney") also testified at the August 1996 evidentiary hearing, and again at Meyer's first and second sentencing hearings. She was not yet married to Rock in April of 1994, but she was living with him. She recalled hearing Hoff tell his son, several days before Fenner disappeared, that Fenner had been talking to the police and could not be trusted. Tenney also recalled that Hoff and Meyer had visited their home on the night before Fenner's disappearance. Although she was in another room of the house, Tenney said that given the volume with which Hoff and Meyer were speaking, she was able to hear bits and pieces of the conversation that they had with Rock that night: "they were just kind of raving." R. 116 at 88. In particular, she claims to have heard Hoff and Meyer say that "they weren't going to have to worry about [Fenner) anymore, and he wasn't going to be talking to anybody." R. 116 at 88. On the following morning, Tenney awoke to find Rock gone from the house. Later that same morning, as she was driving to a class in Eau Claire, she saw Hoff, Rock, and Meyer together in the Blazer. Either that same day or several days later (Tenney wasn't sure which), she asked Rock whether Meyer had shot Fenner. Rock look surprised and purportedly replied,

"I don't know. I don't know what you're talking about." R. 116 at 89.

Tenney's testimony had its vulnerable points as well. First, although Tenney attributed to Hoff and/or Meyer the remark that they wouldn't have to worry about Fenner much longer (R. 116 at 87-88), she admitted on cross-examination that it could have been Rock who made that remark (R. 116 at 99). Second, although Tenney claimed to have seen Hoff, Rock, and Meyer together in Rock's Blazer on the morning of Fenner's disappearance, she placed them on a different highway, seated somewhat differently in the Blazer, than Rock did in his own testimony. Compare R. 116 at 80-81 (Rock), with id. at 102-03, 107-08, and R. 318 at 41-43 (Tenney). Third, Tenney could offer no explanation for having asked Rock whether Meyer had killed Fenner. "I just said it. It was really strange actually. I just said it... I really had no reason to think that Eric would do anything like that. I don't even know where it came from." R. 116 at 108. Indeed, she acknowledged that she had never seen Meyer with a gun, although she had seen Rock with a nine--millimeter handgun. R. 116 at 109. Finally, Tenney admitted that she previously had lied and withheld information from the police in order to protect herself and Rock (R. 116 at 92, 104); she also admitted that she had falsely notarized a quitclaim deed for Hoff in the wake of Fenner's murder so that Hoff could take possession of Fenner's property (R. 116 at 103-04, 105). FBI Agent Charles Southworth would later confirm that Tenney had "lied on a few occasions" (R. 198 at 69) and in several instances had changed her statements to the government after being warned that she could be prosecuted (R. 198 at 68-70).

Chance Gaines was incarcerated at the Dane County Jail along with Meyer while Meyer was awaiting retrial. According to Gaines, Meyer had admitted his involvement in Fenner's murder. The government summoned Gaines to testify at

Meyer's second trial as well as the subsequent sentencing hearing.

Gaines' testimony at trial was to be limited to the subject of Meyer's participation in the narcotics conspiracy, and the prosecutor would later represent that Gaines was instructed not to bring up the subject of Fenner's murder. R. 316 at 124. Gaines nonetheless alluded to "murder cases" on two separate occasions during the trial. On direct examination, the prosecutor asked Gaines whether Meyer had said anything to him "about his goal in this trial as it related to Gordy [Hoff] and Rock." R. 316 at 103. Meyer's attorney objected to the question on relevance grounds, but the court overruled the objection. Gaines answered:

> He, he told me that he was going to try to, you know, get the conspiracy charges dropped and the murder cases dropped. That Rock was the one that, you know, did it and he framed both of them.

R. 316 at 103. On cross-examination, Gaines acknowledged that the same attorney who was prosecuting Meyer, Mr. Vaudreuil, had also prosecuted Gaines. R. 316 at 122. However, Gaines denied having known that fact when he first informed his own attorney of what Meyer had told him in jail. Meyer's attorney followed up on that point:

> Q. So you didn't tell your lawyer to contract Mr.-contact Mr. Vaudreuil with that information?
>
> A. I told him he-asked him what I could do with it, yeah. I was turning in some evidence here on a murder case. Yeah,

> I'd like to get the time reduction out of it. I didn't know that Mr. Vaudreuil was the prosecuting attorney.

R. 316 at 122. Meyer's counsel later attempted to clarify whether Gaines, in his earlier reference to "murder cases," was suggesting that Meyer had claimed that "Rock was getting back at him because he gave information about a murder case[.]" R.316 at 123. Gaines did not understand the question, however, and after an unsuccessful attempt to rephrase it, Judge Shabaz summoned the attorneys to a bench conference. There he warned Meyer's counsel that he was exploring a troublesome subject. R. 316 at 124. Meyer's attorney agreed, but felt he had little choice given that Gaines had already broached the subject of murder. *Id.* At that point, Judge Shabaz asked Meyer's counsel whether he wanted a special instruction directing the jury to ignore that part of Gaines' testimony. R. 316 at 125. Meyer's attorney declined the offer and let the subject drop. The subject of murder was not mentioned again during the trial.

After Meyer was convicted a second time, Gaines returned to testify at the sentencing hearing on the subject of Fenner's murder. According to Gaines, Meyer said that he, Hoff, and Rock had agreed that they needed to get rid of Fenner because he "knew too much" about a murder in Oklahoma and had already been questioned by the FBI in that regard. R. 318 at 59. As a ruse to lure Fenner out to Rock's Osseo farm, Hoff approached Fenner and told him that Rock had been arrested and that they needed to clean out the safe in Rock's farmhouse before the "feds" got to it. R. 318 at 59. Meanwhile, Meyer and Rock drove to the farm and chose hiding places from which they could shoot Fenner. R. 318 at 60. Meyer told Gaines that he was armed with a nine-millimeter pistol and that when Fenner and Hoff arrived, he took a shot at Fenner. R. 318 at 60-61. Gaines asked Meyer whether he was the one who killed

Fenner, and Meyer purportedly replied "[Y]eah, but I just can't tell them that." R. 318 at 61. Meyer added that they did not burn Fenner's body near the farmhouse, as Rock had claimed; instead they had taken the body in the Blazer to a nearby creek, river, or lake and burned it there. R. 318 at 61.

Not surprisingly, Gaines' testimony had its vulnerable points. Gaines acknowledged that his own sentence for fraud was reduced from thirty-three to twenty-three months after he testified on the government's behalf at Meyer's second trial. R. 318 at 57. Another person who had been an inmate at the Dane County Jail, Garland Lightfoot, Jr., testified that Gaines had admitted lying to the government about Meyer's responsibility for the murder. R. 318 at 49-50,55.

The Fenner murder had a substantial impact on Meyer's sentence. Following Meyer's first conviction, Judge Crabb found that Meyer had murdered Fenner in the course of the narcotics conspiracy. R. 198 at 188. Accordingly, she cross-referenced the murder guideline in establishing Meyer's offense level, which resulted in a mandatory term of life imprisonment. *See* U.S.S.G. § 2D1.1(d)(1). After Meyer was convicted the second time on remand, Judge Shabaz also determined that Meyer was responsible for Fenner's murder. Judge Shabaz's determination rested in part upon Judge Crabb's finding, which he believed to be the law of the case, but additionally and independently on his own review of the pertinent evidence on this subject. R. 303 at 6. This included the testimony that Rock had given at the August 1996 evidentiary hearing (R. 303 at 6, R. 318 at 97101), as corroborated by "other credible evidence by witnesses who ... previously testified as to the circumstances of the murder" (R. 303 at 6), and the testimony of Chance Gaines, whom Judge Shabaz specifically found to be credible (R. 303 at 6, R. 318 at 101).

II.

A.

Meyer charges his trial counsel with ineffectiveness for neglecting to ask for a mistrial and/or a cautionary instruction to the jury after Gaines made gratuitous reference to the "murder cases." In fact, Meyer argues, his attorney compounded the problem by asking questions about these "murder cases" during cross-examination. As Meyer himself acknowledges, our review of a trial attorney's performance is "highly deferential." *Strickland v. Washington,* 466 U.S. 668, 689, 104 S. Ct. 2052, 2065 (1984); *see also, e.g., Lowery v. Anderson,* 225 F.3d 833, 843 (7th Cir. 2000). Our analysis begins with the "strong presumption" that the defendant's attorney rendered adequate representation of his client. *Kimmelman v. Morrison,* 477 U.S. 365, 381, 106 S. Ct. 2574, 2586 (1986); *Strickland,* 466 U.S. at 689, 104 S. Ct. at 2065. Moreover, as the Supreme Court has emphasized, the range of attorney performance that will satisfy the Sixth Amendment's guarantee of counsel is wide. *Kimmelman,* 477 U.S. at 381, 106 S. Ct. at 2586; *Strickland,* 466 U.S. at 689, 104 S. Ct. at 2065. To prevail upon a claim of ineffective assistance, a defendant must show both that his counsel's service did not meet an objective standard of reasonableness and that there is a fair probability that but for his attorney's ineffectiveness, the result of the rial would have been different. *Kimmelman,* 477 U.S. at 381, 106 S. Ct. at 2586; *Strickland,* 466 U.S. at 687, 104 S. Ct. at 2064.[10]

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[10] Ineffectiveness claims are normally not well-suited to consideration on direct appeal. E.g., United States v. Neeley, 189 F.3d 670, 683 (7th Cir. 1999), cert. denied, 120 S. Ct. 1245 (2000). In this case, however, the claim rests exclusively on the trial record and Meyer is not represented on appeal by the same person who represented him at trial. See id.

Having reviewed the trial record, we do not believe that the decision not to seek a mistrial or, in the alternative, a cautionary instruction was unreasonable. Gaines' two gratuitous references to a murder case or cases were indeed unfortunate, and we agree that it was possible for the jurors to suspect from Gaines' remarks that Meyer was implicated in a murder. On the other hand, the one and only detail that Gaines offered about the "murder cases" was that Meyer had told him "What Rock was the one that, you know, did it and he framed both of them." R. 316 at 103. That bit of information pointed the finger at Rock as the murderer, rather than Meyer. And in certain respects, Rock's own testimony gave credence to that notion. The jury was read the testimony that Rock had given at the first trial (he refused to testify at the second trial), and in that testimony Rock admitted that he had pleaded guilty to second degree murder in Wisconsin state court and had been sentenced to a twenty-year prison term. R. 315 at 20. Indeed, Rock admitted that he decided to plead guilty after Hoff and Meyer had made statements incriminating him. R. 315 at 71. Rock's testimony was therefore ameliorative in two respects: it would have helped draw the suspicions raised by Gaines' remarks; away from Meyer, and it gave credence to Meyer's contention (as reported by Gaines) that Rock was attempting to "frame" both Hoff and Meyer for having incriminated him. Quite clearly it was the latter theme that Meyer's counsel was attempting to reinforce on cross-examination, when he asked Gaines whether Rock was attempting to get back at Meyer for information he had given on a murder case. R. 316 at 123. Successful or not, we cannot say that his attempt was beyond the range of reasonable tactical decisions once the charge of murder was unexpectedly put in the air. Nor can we fault Meyer's attorney for declining a limiting instruction or for not seeking a mistrial. For the reasons we have discussed, the import of Gaines' remarks was, in the end, ambiguous. A mistrial motion would surely have been denied. And where, as here, a witness has

raised an extraneous matter in his testimony, an instruction directing the jury to disregard the reference always presents the risk that it will unduly highlight the problematic testimony. Under the circumstances presented here, the decision not to ask for such an instruction, and to simply let the matter drop, was a reasonable tactical decision and, as such, did not deprive Meyer of the effective assistance of counsel. *See United States v. Myers*, 917 F.2d 1008, 1010-11 (7th Cir. 1990).

B.

Judge Shabaz's determination that Meyer killed Fenner is a finding of fact that we review for clear error. We noted earlier that Judge Shabaz treated Judge Crabb's previous, identical finding as the law of the case; but he also made an independent finding, based on the evidence before him (which included the testimony of Gaines, who did not testify before Judge Crabb), that Meyer was responsible for Fenner's murder. Neither party suggests that Judge Shabaz's determination is dependent upon Judge Crabb's; both, in fact, largely ignore the law of the case aspect of his determination. Meyer instead contends that the credibility of the government's witnesses is so impaired that their testimony is unreliable as a matter of law, and therefore insufficient to support Judge Shabaz's finding.[11]

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[11] We are not called upon to determine here whether clear and convincing evidence, as opposed to a mere preponderance, was required to support the murder finding. See United States v. Masters, 978 F. 2d 281, 286-87 (7th Cir. 1992), cert. denied, 508 U.S. 906, 113 S. Ct. 2333 (1993). Nor are we asked to consider whether the evidence that Meyer killed Fenner might meet the preponderance threshold but not rise to the level of clear and convincing evidence. Meyer contends that the government's witnesses are so unreliable as to fall short of even the lesser benchmark.

However undistinguished the government's witnesses were, we do not believe that Judge Shabaz was precluded from relying on them. Rock, Tenney, and Gaines, the three key witnesses, each had motives to he, and their accounts of the Fenner murder were not wholly consistent in the details. The district judge, as the finder of fact, would have been free not to credit their testimony. But the credibility determinations were his to make, and he chose to believe these witnesses. That the witnesses against Meyer had impure motives, criminal histories, and a record of telling lies is not remarkable. Nothing in the record supports the contention that they were incredible as a matter of law. And although there were some inconsistencies among their accounts of the murder (as to where precisely Fenner's body was disposed of, for example, or what road Rock, Hoff, and Meyer took after the murder), the discrepancies are not so serious as to render the basic proposition on which they all agreed-that Meyer shot Fenner at the Osseo farm-implausible. *See Kidd v. Illinois State Police,* 167 F.3d 1084, 1095 (7th Cir. 1999).

C.

Finally, Meyer contends that sentencing him pursuant to the first-degree murder guideline violated his right to due process, given that the jury convicted him solely of conspiring to distribute narcotics. Hoff made this same argument, unsuccessfully, in *Meyer I.* (Judge Crabb found that he directed Meyer to murder Fenner, and also that he had murdered another individual). *See* 157 F.3d at 1081-82. We reject Meyer's argument for the same reasons.

III.

For the reasons discussed above, we AFFIRM Meyer's conviction and sentence.

true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA	SUPERSEDING INDICTMENT
v.	Case No. 96-CR-10-C Title 21, U.S.C. § 846 Title 21, U.S.C. § 853
GORDON O. HOFF, SR., and ERIC R. MEYER	
Defendants.	

THE GRAND JURY CHARGES:

COUNT I

That during on or about February 199"? through on or about February, 1996, the exact dates unknown to the grand jury, in the Western District of Wisconsin, the defendants,

GORDON O. HOFF, Sr., and
ERIC R. MEYER

knowingly, intentionally, and unlawfully conspired and agreed with one another, Gordon O. Hoff, Jr., and other persons known

and unknown to the grand jury, to commit the following offenses:

1. To unlawfully, knowingly and intentionally possess with intent to distribute Schedule I and Schedule 11 controlled substances, specifically marijuana and cocaine, in violation of Title 21, United States Code, Section 841(a)(1); and

2. To unlawfully, knowingly and intentionally distribute Schedule I and Schedule II controlled substances, specifically marijuana and cocaine, in violation of Title 21, United States Code, Section 841 (a) (1).

All in violation of Title 21, United States Code, Section 846.

A TRUE BILL

_____

PRESIDING JUROR

_____

Peggy A. Lautenschlager
United States Attorney

Indictment returned: _____

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA

Plaintiff,

VERDICT

v.

96-CR-10-S

ERIC R. MEYER,

Defendant.

We, the jury in the above-entitled cause, find the defendant Eric R. Meyer

_____
("Guilty" or "Not Guilty")

of the offense charged in the indictment returned against him.

Signed this _____day of _____,1999.

_____

Foreperson

APPENDIX E

DEFENDANT: ERIC MEYER
CASE NUMBER: 3:96CROO0010-002

STATEMENT OF REASONS

On September 18, 1996, a jury returned a guilty verdict against the defendant for the offense of Conspiracy to Distribute Cocaine. The defendant was sentenced on December 20, 1996, to life imprisonment. On June 3, 1998, the Seventh Circuit Court of Appeals remanded this case for retrial. A guilty verdict was returned by the jury on February 11, 1999 for the defendant's second trial. The defendant is again facing sentencing for Conspiracy to Distribute a Schedule II Controlled Substance. The defendant waived a new presentence report. Pursuant to Rule 32(b)(A), the Court finds that there is sufficient information on the record to exercise its sentencing authority.

Defendant Eric R. Meyer was a participant in a drug conspiracy that involved over 5 kilograms of cocaine. Prior to finding that the defendant was involved in a murder during the course of the drug conspiracy it is determined that the sentencing range for imprisonment is 235 - 293 months based on defendant's criminal history category III and an offense level of 36.

The Court has previously determined, to which objection is not being offered, that defendant was involved in the distribution of 5.7 kilograms of uncut cocaine and 422 pounds of marijuana. This results in a base offense level of 32 to which there is added a two level increase where a dangerous weapon was possessed during the course of the conspiracy. The adjustment is applied because a hand gun was possessed by defendant Meyer during

the crime of conviction. Other weapons were also possessed. Defendant Gordon Hoff, Sr. accepted a derringer in payment of a drug debt and provided a MAK-90 to David Atherton in connection with the purchase of cocaine. The weapons were all connected with the actions of defendant Meyer and his co-conspirators in furtherance of the drug conspiracy.

Another two level enhancement is provided for the defendant's attempt to subvert the government's investigation and prosecution of this case. These two enhancements and defendant's criminal history challenge have previously been decided in this case at the defendant's first sentencing and are decided pursuant to the law of the case doctrine to include the examination of those transcripts which accurately reflect the evidentiary hearings held before the Honorable Barbara B. Crabb, United States District Judge. The obstruction of justice enhancement is also based on defendant's perjury at trial, his continued false statements before the Court at sentencing where he has denied relevant conduct as well as his knowledge concerning the use of the basement for drug purposes, his denial that he sold cocaine and marijuana for co-defendant Hoff, Sr., the denial of any knowledge concerning Hoff, Sr.'s drug dealings, of those threats which he made to Flynn and Fransway and, finally, his singular journey to Indiana to obtain cocaine with Gordon Hoff, Jr. All these statements were either perjurious or a denial of relevant conduct and/or the subversion of the government's investigation and prosecution of this case.

The criminal history category III was previously determined at the defendant's first sentencing and is once again determined to be a level III. The conviction which defendant disputes relates

to that offense for which he was arrested on February 2,1982 in Dunn County and charged with forgery and

theft. He received a 90 day jail sentence with three years probation on March 24, 1982. His probation was revoked on August 13, 1984 for which he received a two year term of imprisonment. The assessment of 3 points is appropriate because in the case of a probation revocation the original term of imprisonment is added to any term of imprisonment imposed upon revocation of probation. Accordingly, the prior sentence of imprisonment exceeding one year one month was imposed within 15 years of defendant's commencement of this offense and is counted as 3 which then provides a total of 6 points for a criminal history category III.

The Court adopts the guideline calculations prepared by the probation office, using the 1995 guidelines manual. The calculations take into account all of the defendant's relevant conduct, as defined in §§ 1B1.3(a)(1) and 3Dl.2(d).

Applying the doctrine of the law of the case which establishes a presumption that a ruling made at one stage of the proceedings will be adhered to throughout the suit, the transcripts previously referred to and the failure of defendant to provide any contrary evidence whatsoever at sentencing, the Court finds that by clear and convincing evidence this defendant Eric R. Meyer shot and killed Dennis Fenner in April 1994 pursuant to a previous plan with co-defendant Hoff, Sr. and assisted his two co-conspirators in the disposition of Fenner's body by burning so as to advance the drug distribution conspiracy of which he was a part.

DEFENDANT: ERIC MEYER
CASE NUMBER: 3:96CROO0010-002

Pursuant to § 2D1.1(d)(1), the Court applies the cross reference in setting the offense level in accordance with § 2A1.1 of the sentencing guidelines. Section 2A1.1 of the guidelines has a base offense level of 43. Two additional levels are added for obstruction. The defendant obstructed the original investigation in this matter by providing false information concerning the death of Dennis Fenner as well as false information regarding the defendant's involvement in drug distribution. The defendant again obstructed justice by committing perjury when he testified falsely in the second trial concerning his drug dealings with Gordon Hoff, Sr., and Gordon Hoff, Jr.. This results in a total offense level of 45. The defendant's criminal history category is III. With a total offense level of 45 and a criminal history category of III, the guideline range is life imprisonment.

This Court finds from its independent examination of those transcripts of the proceedings previously held before Judge Crabb that Eric R. Meyer shot and killed Dennis Fenner at the direction of Gordon Hoff, Sr. The defendant is a totally incredible witness. The testimony of Gordon Hoff, Jr. relating to said murder is corroborated not only by other credible evidence by witnesses who have previously testified as to the circumstances of the murder, but by the testimony of Chance Gaines to whom the defendant accurately related the circumstances described in the testimony of Hoff, Jr.

A sentence of life imprisonment is necessary in order to reflect the seriousness of the defendant's criminal conduct, protect the community, hold the defendant accountable for his conduct, and promote general deterrence.

DEFENDANT: ERIC MEYER
CASE NUMBER: 3:96CROO0010-002

Guideline Range Determined by the Court:

Total Offense Level: **45**

Criminal History Category: **III**

Imprisonment Range: **Life**

Fine Range: **$25,000 to $4,000,000**

Restitution: **N/A**

APPENDIX F

July 12, 2000

VIA UPS DELIVERY
Mr. Gino Agnello
Clerk of Court
U.S. Court of Appeals
for the Seventh Circuit
219 S. Dearborn St.
Chicago IL 60604

RE: United States of America, Plaintiff-Appellee
v.
Eric R. Meyer, Defendant-Appellant
Appeal No. 99-1919

Dear Mr. Agnello:

Pursuant to Fed. R. App. P. 28(j) and Circuit Rule 28(e), Defendant-Appellant Eric R. Meyer encloses ten (10) copies of the Supreme Court's decision in Apprendi v. New Jersey, 2000 WL 807189. Defendant-Appellant believes this case may support his argument as found in Section III of his brief at page 29.

Sincerely yours,

Michael J. Gonring

DEFENDANT: ERIC MEYER
CASE NUMBER: 3:96CROO0010-002

MJG/bgn
*w/encls.
650830.70018

cc: John W. Vaudreuil, Esq. (w/encl.)
Assistant U. S. Attorney
Suite 200, City Station
660 W. Washington Avenue
P.O. Box 1585
Madison, WI 53701-1585
bc: Eric Meyer (w/encl.)